STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2003
v KENSHAWN V SIEBERT, Defendant-Appellant.	No. 233959 Macomb Circuit Court LC No. 00-3197 FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CARLTON LAMONT BROWN, Defendant-Appellant.	No. 233960 Macomb Circuit Court LC No. 00-3200 FC

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendants were convicted of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529. Defendant Brown was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b.[1] Defendants appeal as of right. We affirm.

[1] Defendant Siebert was sentenced to serve 84 to 180 months' imprisonment, with credit for 218 days served, for each of his convictions. Defendant Brown was sentenced to 132 to 240 months' imprisonment on his convictions of armed robbery and conspiracy to commit armed robbery. He also received a two-year sentence for his conviction of possession of a firearm during the commission of a felony.

I. Facts and Proceedings

Defendants' convictions arise out of an armed robbery that occurred at the Burger King restaurant at 2411 Eight Mile Road in Warren. At trial, Officer Gino Rea of the Warren Police Department testified that on September 3, 2000, just before 5:00 a.m., he responded to a report of an armed robbery at the restaurant. When he arrived at the scene, four Burger King employees, Lakisha Maryland, Juanita Gibson, Antonio Harris, and William Mills, met him outside the restaurant, waived him down, and told him that they had been robbed by two black males less than five minutes before his arrival. The employees showed Officer Rea a fire door on the east side of the restaurant that had been held ajar by a dishtowel from the restaurant. The robbers used the side door for their entry and exit.

Maryland informed Officer Rea that defendant Brown had robbed her, but she did not identify the second perpetrator. She told the officer that as she was doing paperwork in the office, defendant Brown, who was armed with a double barrel shot gun, forced his way into the office and demanded money from her. Although defendant Brown was wearing a "dragon" mask, she recognized defendant Brown, a former employee, by his voice. In response to Officer Rea's request for more specific information, she indicated that defendant Brown held the gun to her head and threatened to kill her. She asked him, "Carlton, why are you doing this?" At that point, she said, the perpetrator's eyes grew wide and she knew it was defendant Brown. She also told Officer Rea that the second perpetrator held her in a chokehold at one point during the incident.

The witnesses to the robbery described the first perpetrator to Officer Rea as an African-American male, five feet eleven inches tall, weighing approximately 165 pounds. He was wearing a "dragon" mask and was armed with double barrel shot gun. The second suspect was an African-American male of approximately the same height, weighing three hundred pounds. He was wearing dark sunglasses and a white bandana over part of his face. He also had a long goatee. None of the witnesses mentioned defendant Siebert by name during Officer Rea's interview.

Juanita Gibson testified that she was a cashier at the Burger King and worked from 7:00 p.m. on September 2, 2000 until closing on September 3, 2000. At that time, she was living with her boyfriend, Antonio Harris, who also worked at the Burger King. She knew defendant Brown because he lived next door to Harris. She had known defendant Brown for two and a half years. Additionally, defendant Brown's wife[2] worked at the Burger King, and defendant Brown had visited her there during previous shifts. She also knew defendant Siebert, who is a close friend of Harris.

Gibson testified that around 4:00 or 5:00 p.m. on September 2, 2000, Harris met with defendant Brown and returned from the meeting approximately thirty minutes later. After Harris returned, she asked him about the meeting, and he told her that it "doesn't concern" her and that something was "going down." Despite her prodding, Harris would not give her any indication of what he meant. Gibson and Harris then walked to work together. Near the end of their shift,

[2] Defendant Brown's wife is also referred to as his girlfriend in the trial transcripts.

around 4:15 or 4:20 a.m., Harris told Gibson to place a dishtowel in the doorway. He did not explain why he wanted her to place the towel there, but told her that she should do it or find another place to live. Gibson complied, placing the towel in the side exit door to hold it ajar. Unless the door was propped open, it could not be used as an outside entrance because the door did not have a handle on the outside. Gibson said that she knew that something was going to happen after she placed the towel in the doorway, but did not know what.

Shortly after she put the towel in the doorway, two men entered. Gibson said that defendant Brown was carrying a gun, although at the time she did not know that he was the robber because he was wearing a mask. She ran, screaming, to the back of the restaurant. The two robbers followed and ordered Harris, Mills, and Gibson to enter the walk-in cooler and freezer. At the time, Maryland, the shift manager, was in the office. After being in the cooler for approximately one minute, the unarmed perpetrator let Gibson out of the cooler and told her to go open the safe. Gibson told him that she could not open the safe because she did not have the combination. Nevertheless, the unarmed perpetrator led Gibson to the front of the restaurant. While Gibson was walking, she heard Maryland scream. By the time they reached the office, the safe was already open. The unarmed perpetrator pushed her to the ground, and the armed perpetrator took the money from the safe. The armed perpetrator then said, "Come on, let's leave." At that point, Gibson recognized the voice as defendant Brown's. Gibson said that as he walked away, she noticed that the physique of the perpetrator appeared consistent with defendant Brown's physique.

Gibson said that after the robbers left, Maryland let Harris and Mills out of the freezer and asked the three of them, "Why did you do this?" Harris inquired about why Maryland asked the question, and Maryland replied that "that was Carlton and you know it." Harris then exited the restaurant through the front door and called the police from a pay phone outside of the restaurant.

When the police arrived, they asked the employees to write an incident report. Gibson admitted that she did not indicate in the report that she was involved with the crime. Gibson kept quiet because she still had to go home with Harris. Gibson further testified that after she saw the perpetrators enter the restaurant, she "knew something was . . . about to happen because why would he want to put a towel in the door."

Later on September 3, 2000, the police arrived at Harris' house and asked Harris and Gibson to go to the police station to make a statement. When they arrived at the station, police officers interviewed Harris, Mills, and Gibson in separate rooms. Initially, Gibson was not forthcoming about her involvement in the robbery because she was scared. Gibson told the police that she dropped the towel on the floor and that Harris put it in the door. Eventually, however, she admitted her involvement. Gibson also told the officers during her interview that she recognized defendant Brown by his voice during the robbery. She could not identify the second perpetrator, however, although she recalled seeing a scar on his left hand.[3] After Gibson

[3] Officer Arty Mott, the officer who handcuffed defendant Siebert when he was arrested, testified that he did not notice any scars or tattoos on defendant Siebert's wrists when he handcuffed him. After examining defendant Siebert in court, he did not find a scar on his left hand, as indicated in Gibson's statement, but did find a scar on his right hand. The scar did not appear to have the

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admitted her involvement, the officers arrested her. Gibson pleaded guilty to unarmed robbery in exchange for her testimony.

Lakisha Maryland testified that she was the shift supervisor for the midnight shift on September 2-3, 2000 at the Burger King. Maryland had worked with defendant Brown on four or five occasions over a nine-month period before the robbery. Defendant Brown also had chatted with Maryland occasionally when visiting his girlfriend who also worked at the Burger King. Maryland had known defendant Siebert for approximately ten years before the robbery. For one year, they lived across the street from one another. Defendant Siebert also worked at the Burger King on Maryland's shift for approximately one month.

Maryland said that immediately before the robbers entered, she was in the office completing paper work. She heard Gibson scream, exited the office door, and saw Gibson coming toward her, followed by defendant Brown, who was carrying a shotgun. Maryland ran back into the office and stood against the office door, trying to keep defendant Brown from entering the office. Defendant Brown pushed the door open, stuck the gun through the doorway, and told Maryland to open the door and open the safe. Maryland knelt by the safe under the desk and tried to open it. By this time, defendant Brown was pointing the gun at her head. Defendant Brown told her to hurry and that if the police came, he was going to "take her out." As he was talking to her, Maryland recognized the voice as defendant Brown's voice. Maryland asked him, "Carlton, why [are] you doing this?" After Maryland said his name, his eyes widened, as though he was startled. Still trying to open the safe, Maryland told defendant Brown that she needed Gibson to help her. By the time Gibson arrived, however, Maryland had opened the safe, and defendant Brown was on the ground stuffing the money from the safe into a bag.

After defendant Brown placed his gun on the floor, Maryland ran out of the office and encountered defendant Siebert near the back door. Defendant Siebert grabbed her and lifted her off of the ground by her neck, holding her there for approximately one minute. Defendant Siebert was wearing dark sunglasses, a bandana that covered his face from his mouth down, and a jacket for a dragon costume. When the perpetrators started to leave, defendant Siebert pushed Maryland to the floor. At that point, Maryland recognized defendant Siebert by his build. When defendant Brown started to walk toward the back door, defendant Siebert said "Psst, Psst" to get defendant Brown's attention and motioned for him to leave through the side door, which they did. Maryland said she also recognized defendant Siebert by his voice.

After they left, Maryland went to the walk-in cooler to get Harris and Mills. The cooler can be opened from the inside, but Harris and Mills did not leave the cooler during the incident. When Maryland opened the cooler door, she asked them where they had been. When they all went outside, Maryland accused them of being involved in the crime because they could have gotten out of the cooler and they knew that defendants Brown and Siebert were the perpetrators.

After the police came, she mentioned defendant Brown's involvement but did not mention defendant Siebert at that time because the officers had specifically asked her what happened in the office. Later on, a police detective asked her to give a step-by-step statement

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suture marks that Gibson indicated in her sketch of the scar.

concerning the entire incident. At that point, she identified defendant Siebert as the second perpetrator.

Regina Harrison, the manager of the Burger King, worked during the day of September 2, 2000, and came back between 11:30 p.m. and 12:00 a.m. to check on the staff. She left the restaurant between 12:30 and 1:00 a.m., but checked all of the doors, including the side door, to make sure they were locked. While she was at the restaurant, she noticed a car parked in the lot on the same side of the restaurant as the door used by the robbers. When she arrived at the restaurant, the car was facing west. When she left, however, the car was facing east. The video surveillance equipment at the Burger King was not working at the time of the robbery, but Harrison was unaware of the malfunction until after the robbery.

Detectives Andy Keiper and Kevin Howell of the Warren Police Department were assigned to the robbery investigation. When Detective Keiper interviewed Maryland on September 3, 2000, she identified defendants Brown and Siebert as the perpetrators of the robbery. Maryland said that she recognized Siebert by his voice when he told his accomplice not to use the back door. According to Maryland, the back door is equipped with an alarm that would sound if the door opened. Gibson told Detective Keiper that she recognized defendant Brown by his voice and that his voice is unusual.

William Mills, who also worked at Burger King that night, is Gibson's brother.[4] He testified that on the night of the robbery, Harris approached him around 8:00 p.m. and asked him if he wanted to make $500. When Mills asked Harris how he could make $500, Harris told him to "just say yeah." Their conversation was interrupted by a customer placing an order, and they never resumed it. When the robbery occurred, Mills was cleaning in the kitchen area when he heard a scream. Harris entered the kitchen area and Mills saw a man run by with a twelve-gauge shotgun. Mills proceeded toward the back of the restaurant and saw the second perpetrator. The second perpetrator ordered him into the walk-in cooler, saying "you're in the freezer fat boy." Mills did not resist, but complied with the perpetrator's order.

Mills knew when the robbery was taking place that defendant Brown was the perpetrator carrying the shotgun and that defendant Siebert ordered him into the cooler. Specifically, Mills recognized defendant Siebert's voice. Mills had known defendant Siebert for a year prior to the robbery and had socialized with him on several occasions. According to Mills, defendants Brown and Siebert also socialize with one another. Because Mills knew defendant Siebert, he did not immediately tell the police that defendant Siebert was one of the robbers. When they later questioned him, however, he admitted that the voice and build of the robber matched defendant Siebert's. Mills also informed the police that Harris had asked him if he wanted to make $500 that night.

Detective Kevin Howell testified that he interviewed Mills on September 3, 2000. Although Mills made reference to defendant Siebert toward the end of the interview and said that the second perpetrator could have been him, Mills did not state that he knew that defendant

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[4] Harrison testified that Mills worked that shift because defendant Brown's wife had not appeared for work that night.

Siebert was one of the robbers. Before Mills mentioned defendant Siebert, Detective Howell informed Mills that defendants Siebert and Brown had been named as suspects. Detective Howell knew of no physical evidence linking defendants to the crime.[5]

Defendant Siebert testified that he lives across the street from the Burger King that was robbed and had worked at the Burger King for three weeks in August 2000. He denied being friends with Mills, but said that he had seen him on occasion in their neighborhood. Defendant Siebert said that he weighs between 240 and 250 pounds and does not make fun of people because of their weight. He denied committing the robbery and knowing who did commit it. Defendant Seibert also denied having a cut that required sutures on either hand or wrist. He claimed that at the time of the robbery, he was sleeping at home. Because his wife and children were on vacation, Defendant Siebert was at home by himself that night. He testified that he is a good friend of defendant Brown and that he last saw him twelve days before the date of the incident.

Defendant Brown rested without presenting proofs. Following deliberations, the jury convicted defendants of armed robbery and conspiracy to commit armed robbery. The jury also convicted defendant Brown of possession of a firearm during the commission of a felony.

On appeal, both defendants contend that the trial court abused its discretion by admitting Gibson's testimony concerning Harris' statements to her about his meeting with defendant Brown. Defendant Siebert also argues that the trial court violated his right to confrontation by preventing defense counsel from asking Gibson whether she had claimed that her statement to the police was involuntarily made. Defendant Brown also argues 1) that the trial court erred by admitting Maryland's statement identifying him to Detective Keiper pursuant to MRE 801(d)(1)(B) and MRE 801(d)(1)(C); 2) that the evidence was insufficient to convict him of each of the three offenses; 3) that the trial court erred by failing to instruct the jury concerning the prosecution's burden of proving defendant's identity as the perpetrator of the offenses and that his trial counsel was ineffective for failing to request the instruction; and 4) that the prosecutor made prejudicial comments during closing arguments.

II. Standards of Review

We review the trial court's decisions concerning the admissibility of evidence for abuse of discretion. *People v Gonzalez*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 233401, rel'd 4/8/03), slip opinion at 3. "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *Id.*

A violation of the right to confrontation is a constitutional question subject to de novo review. *People v Washington*, 251 Mich App 520, 524-525; 650 NW2d 708 (2002). However, unpreserved claims of constitutional error are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 461 Mich 750, 763-765; 597 NW2d 130 (1999).

[5] Detective Howell testified that the latent fingerprints obtained by Officer James Randlett from the door used by the perpetrators to enter and exit the Burger King and the door to the restaurant office were not identifiable.

We review a challenge to the sufficiency of the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002). This Court will not revisit the jury's determinations of the credibility of witnesses or weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). "[A]ll conflicts with regard to the evidence must be resolved in favor of the prosecution." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000), citing *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Lee, supra* at 167-168.

Preserved claims of instructional error are reviewed de novo. *Gonzalez, supra* at 11. We review the instructions in their entirety to determine whether the instructions fairly presented the issues and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). However, this Court reviews unpreserved claims of instructional error for plain error affecting the defendant's substantial rights. *Id.* at 124-125.

This Court reviews claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 227938, rel'd 4/10/03) slip opinion at 4. When a claim of prosecutorial misconduct is not properly preserved, our review is limited to whether a plain error affected defendant's substantial rights. *Id.* at 5.

III. Analysis

A. Evidentiary Issues

At trial, defendants objected on hearsay grounds to Gibson's testimony that Harris told her that the subject of his meeting with defendant Brown "doesn't concern" her and "it's going down." Defendants argue on appeal that the trial court erred by admitting the testimony as a statement of a coconspirator pursuant to MRE 801(d)(2)(E). We disagree. A statement is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2)(E).

Defendant Brown claims that because the prosecution did not produce sufficient evidence of a conspiracy to convict him, the trial court erred by permitting the introduction of Gibson's testimony concerning Harris' statement. We first note that the prosecution's burden of proving its case beyond a reasonable doubt does not apply to the introduction of Gibson's testimony. Rather, the prosecution must show by only a preponderance of the evidence that a conspiracy exists in order to introduce evidence under MRE 801(d)(2)(E). *People v Jenkins*, 244 Mich App 1, 22-23; 624 NW2d 457 (2000); *People v Vega*, 413 Mich 773, 782; 321 NW2d 675 (1982). The evidence showed that moments after Harris directed Gibson to prop open a side door not intended for outside entry, two men in partial disguises entered the closed restaurant through that door and committed armed robbery. Almost immediately following the robbery, the victim identified defendant Brown as one of the perpetrators. "Direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties. . . . Inferences may be made because such evidence sheds light on the coconspirators' intentions." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). In

light of these facts, it is reasonable to infer that the door was purposefully propped open to facilitate defendant Brown's participation in the subsequent armed robbery and that Harris had agreed to assist defendant Brown in the commission of the armed robbery. Therefore, the trial court did not err in finding sufficient evidence of a conspiracy, independent of Gibson's testimony, to admit the statements.

Defendant Siebert argues that the evidence of his involvement in a conspiracy was insufficient to admit Gibson's testimony against him. He correctly notes that at the point of Gibson's trial testimony, no one had specifically testified that defendant Siebert was the unarmed perpetrator (although Sergeant Daniel Demeester had testified that defendant Siebert had been arrested). However, evidence introduced later in the trial pointed to defendant Siebert as one of the coconspirators. The trial court may admit testimony contingent on independent proof of the conspiracy being admitted later in the trial. *People v Till*, 115 Mich App 794; 323 NW2d 14 (1982). Although the trial court did not state that the admission was contingent on later proofs, Maryland's and Mills' testimony admitted after Gibson testified implicated defendant Siebert as the perpetrator who entered the restaurant with defendant Brown through the door that Harris had instructed Gibson to jar with the towel.

Even if the trial court's decision was erroneous, reversal is not required. "A preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Although Gibson's testimony concerning the meeting served to connect defendant Brown to Harris, it did not connect defendant Siebert to Harris. Rather, the evidence of his participation in the armed robbery with defendant Brown moments after Gibson propped open the door at Harris' urging shows that defendant Siebert engaged in the conspiracy. Accordingly, any error was not outcome determinative.

Next, defendant Brown argues that the trial court erred by overruling his hearsay objection to Detective Keiper's testimony in which he indicated that Maryland had reported to Officer Rea that defendant Brown was one of the perpetrators. The trial court based its decision to admit the testimony on MRE 801(d)(1)(B), a statement "consistent with the declarant's testimony [that] is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," and MRE 801(d)(1)(C), a statement "of identification of a person made after perceiving the person."

We first note that defendant Brown mischaracterizes the testimony. Detective Keiper did not testify to what Maryland told Officer Rea. Rather, he recounted what Maryland told him when he interviewed her. Nevertheless, we find that the trial court improperly concluded that the statement was admissible under MRE 801(d)(1)(B). Although defendants repeatedly claimed that Maryland's identification of defendant Brown was mistaken, noting that she testified at the preliminary examination that she "thought" defendant Brown was the armed perpetrator but stated at trial that she was positive of his identity, defendants did not claim that she had fabricated her story. Without such an accusation, the statement is not admissible under MRE 801(d)(1)(B). *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

We find, however, that the trial court properly admitted the statement under MRE 801(d)(1)(C). Defendant Brown claims that for Detective Keiper's testimony to be admissible,

Detective Keiper needed to be present when Maryland perceived defendant Brown. Defendant Brown provides no support for this argument, and the plain language of the rule does not impose such a requirement. The rule requires that the declarant, Maryland, testify in court subject to cross-examination concerning the statement and that the statement is one of identification made after perceiving the person. The rule does not require the witness, Detective Keiper, to observe the declarant perceiving the person whom she is identifying.

B. Right to Confrontation

Defendant Siebert contends that his constitutional right to confront witnesses was violated when the trial court prohibited defense counsel from asking Gibson if she had told her attorney that her statement to the police was coerced. Defendant requested admission of the evidence on another basis, so this issue has not been properly preserved. *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). Accordingly, our review is limited to whether a plain error occurred that affected defendant's substantial rights. *Carines, supra.*

During trial, defendant Brown's counsel cross-examined Gibson concerning the disparity between her initial version of the robbery and her final version of events. In this line of questioning, he asked her, "Isn't it true, ma'am, that at some point in time you told your lawyer that the police had forced you to make a statement?" The prosecution immediately objected, and the trial court stated that conversations between Gibson and her attorney were privileged. Defense counsel continued his cross-examination without further argument, asking Gibson if she ever claimed "that the quote/unquote truthful statement that you [Gibson] made to the police was made by you against your will." She responded, "[n]o one forced me to tell the truth. I told it because I did it. I was wrong."

At that point, defense counsel requested an unidentified jury instruction, and the prosecution objected, claiming that the question posed to Gibson called for her to analyze her attorney's actions. After the jury was excused, defense counsel claimed that because an attorney acts as an agent of his client and Gibson's attorney had requested a hearing disputing the voluntariness of her statement, the question was appropriate. Defense counsel stated that he wanted to ask Gibson whether a hearing had been requested and when Gibson said no, he wanted the trial court to instruct the jury that her attorney had in fact requested the hearing.[6]

The trial court instructed the attorneys to research the issue during the lunch recess. When they returned, defendant Brown's attorney stated that he wanted the evidence admitted under MRE 801(d)(2) as a prior statement of a witness. The trial court rejected the request, however, noting that MRE 801(d)(2) pertains to written or oral statements, and defense counsel could not identify a statement that he wanted to have admitted. The trial court stated,

> What you want is for me to in effect create a statement and say that the fact that she, through counsel, requested a hearing amounts to a statement that is now

[6] Defendant Brown's counsel realized that Gibson's attorney did not file a written motion. Defendant Siebert's attorney noted that an oral motion had been made and requested that the trial court instruct the jury that a hearing had been requested and inform the jury of the purpose for such a hearing.

admissible into evidence. I don't think it rises to the level of the statement under the rule. So I'm denying the request.

On appeal, defendant Siebert claims that the trial court erred because its ruling denied him his constitutional right to confront witnesses. The Confrontation Clause of the Sixth Amendment guarantees the defendant the right to confront the witnesses called against him. *People v McIntire*, 232 Mich App 71, 102; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999); *People v Adamski*, 198 Mich App 133, 137-138; 497 NW2d 546 (1993). Cross-examination is a primary interest secured by this right. *McIntire, supra* at 102. Moreover, "[t]he credibility of a witness is an issue that is of the utmost importance in every case and defendants are guaranteed a reasonable opportunity to test the truth of a witness' testimony." *Id.*

As defendant Siebert argues, the trial court's comment that attorney-client privilege prohibited cross-examination concerning Gibson's conversations with her attorney was erroneous. Common law and statutory privileges such as the attorney-client privilege may be superceded by the defendant's constitutional right to cross-examination. *Adamski, supra* at 137-138; see also *People v Bortnick*, 28 Mich App 198, 200-201; 184 NW2d 275 (1970). Nevertheless, we find that reversal is not required because the error did not affect defendant's substantial rights. Gibson's testimony did not implicate defendant Siebert. She specifically stated that even on the day of trial, she could not identify the perpetrator who robbed the restaurant with defendant Brown. Defendant Siebert's identity as the second perpetrator was confirmed by Maryland and Mills. Therefore, we find that the trial court's error did not cause the conviction of an actually innocent individual or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Abraham, supra* at 5.

C. Sufficiency of the Evidence

Defendant Brown contests the sufficiency of the evidence to support his convictions. We find that the evidence was sufficient to convict him of armed robbery, conspiracy to commit armed robbery, and possession of a firearm during the commission of a felony.

MCL 750.157a states that "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein." Defendant Brown first argues that the only evidence of a conspiracy was Gibson's testimony concerning Harris' meeting with defendant Brown. We agree that this testimony alone would not be sufficient to sustain defendant Brown's conviction. However, the prosecution presented ample evidence that showed that defendant Brown had conspired with defendant Siebert to commit armed robbery. The prosecution did not have to prove that defendant Brown conspired with Harris, but needed to prove that he agreed with one other person to commit an unlawful act. MCL 750.157a. "[S]pecific intent to combine, including knowledge of that intent, must be shared by two or more individuals because "there can be no conspiracy without a combination of two or more." *Justice, supra* at 346, quoting *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). "Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven." *People v Atley*, 392 Mich 298, 311; 220 NW2d 465, overruled on other grounds 466 Mich 417 (2002).

The prosecution introduced evidence that after 4:00 a.m., defendants simultaneously entered the Burger King through a side door that was not intended for customer entry just after Harris directed Gibson to jar the door with a towel, that the restaurant was already closed when they entered, that both men were at least partially disguised, that Defendant Brown wore a "dragon" mask and defendant Siebert wore a "dragon" costume jacket, that defendant Brown carried a weapon, and that once they entered, they proceeded to commit armed robbery. Viewing the evidence in a light most favorable to the prosecution, we find that this evidence strongly supports an inference that before defendants entered the restaurant, they agreed to perpetrate the armed robbery.[7] "What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002).

Similarly, we find that the evidence is sufficient to support defendant's convictions of armed robbery and felony firearm. With regard to these convictions, defendant argues that the evidence of his identity as the perpetrator of the crimes was insufficient because the jury could not believe the testimony of the witnesses against him. Although defendant Brown acknowledges that issues of witness credibility are generally beyond this Court's review, defendant claims that in this case, the "exceptional circumstances" outlined in *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998), justify this Court's consideration of witness credibility. In *Lemmon*, the Court stated that in deciding a motion for new trial based on the great weight of the evidence, a trial court may consider issues of witness credibility if the testimony contradicts physical facts or laws, is patently incredible, inherently implausible, or has been so seriously impeached that "uncertainties and discrepancies" riddle the case. *Id.*

Defendant's reliance on *Lemmon* is misplaced. The Court in *Lemmon* addressed the circumstances under which a trial court might consider witness credibility in determining whether the great weight of the evidence supports a conviction. Here, because defendant Brown challenges the sufficiency of the evidence, our review is confined to determining whether the prosecution presented sufficient evidence to permit a reasonable jury to find defendant guilty beyond a reasonable doubt. *Hardiman, supra* at 420-421. Viewing the evidence in a light most favorable to the prosecution, we find that the evidence, if believed by the jury, was sufficient to convict defendant Brown of the crimes charged.

D. CJI 7.8

Defendant Brown argues that the trial court erred by failing to read CJI 7.8 to the jury and that his trial counsel was ineffective for failing to request that the trial court read the instruction. We disagree. CJI 7.8 instructs the jury that the defendant's identity as the perpetrator of the offense is an essential element of the prosecution's case and provides the jury with guidance for considering identification testimony. Defendant Brown's trial counsel did not object to the trial court's failure to read this instruction, so the issue has not been preserved, and defendant has forfeited review of this issue unless he demonstrates a plain error that affected his substantial rights. *Aldrich, supra* at 124-125. In addition to claiming that the trial court erred, defendant

[7] Contrary to defendant Brown's argument, inferences may rely on other inferences. *People v Hardiman*, 466 Mich 417, 424-428; 646 NW2d 158 (2002).

Brown claims that his attorney rendered ineffective assistance by failing to request this instruction. Because defendant Brown did not make a motion for new trial or request a *Ginther*[8] hearing, our review of defendant's attorney's performance is limited to mistakes apparent on the record. *Lee, supra* at 183.

As the prosecution indicates, this Court's decision in *Lee, supra* is on point. In *Lee*, the defendant also argued that the trial court erred by failing to read CJI 7.8 and that his trial counsel provided ineffective assistance because he failed to request the instruction or object to the instructions as provided. *Id.* at 183. Finding no error, the Court stated that

> [t]he instructions as given did not remove a not guilty verdict from the jury's consideration, did not rule as a matter of law on any element of the offense, did not misrepresent any information, and did not misdefine any defense. The instructions also did not omit a basic and controlling issue in the case. The jury was aware that [the] defendant challenged the victim's identification. . . . The jury was subsequently instructed that the prosecution had to prove beyond a reasonable doubt that defendant committed the crime . . . . It was instructed about how to consider the evidence from trial in making its decision. Thus, it appears that the jury was instructed on the applicable law, and the case was fully and fairly presented to it. [*Id.* at 183-184].

Similarly, in the instant case, defendant's attorney stressed that Maryland's identification testimony may have been mistaken, particularly in light of the fact that she did not recall that the perpetrator's hands were damaged in any way, although defendant Brown's hands had been visibly damaged because of frostbite. He also emphasized that Maryland could not identify any characteristics of defendant Brown's voice that distinguished it from other voices and that the estimation of the perpetrator's height she provided to the police differed from defendant Brown's height by several inches. Additionally, defendant's trial attorney criticized Gibson's credibility, noting that she had admitted to lying to the police and that she had entered into a plea bargain in exchange for her testimony. Moreover, the trial court instructed the jury that the prosecution had the burden of proving each element of the crimes beyond a reasonable doubt and provided guidelines concerning how to consider identification testimony and evaluate witness credibility. Like the Court in *Lee*, we conclude that the trial court did not plainly err by failing to read CJI 7.8.

The Court in *Lee* also found that the defendant's attorney's failure to request CJI 7.8 did not constitute ineffective assistance of counsel. *Lee, supra* at 184. In the instant case, defendant states only that he "would have benefited" from having CJI 7.8 read to the jury. However, to show ineffective assistance of counsel, the defendant must show that his counsel's performance fell below an objective standard of reasonableness and that but for the error, there was a reasonable probability that the outcome of the proceedings would have been different. *Id.* at 184-185. As stated above, the trial court adequately instructed the jury, and defendant Brown's trial counsel consistently argued that the identification testimony was not credible. Therefore, defendant Brown was not denied the effective assistance of counsel.

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[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

E. Prosecutorial Misconduct

Defendant Brown also argues that the prosecutor made prejudicial comments during her closing argument. Specifically, he claims that the prosecutor elicited sympathy for Maryland and that the prosecutor vouched for the credibility of Gibson and Maryland. Because defendant did not object to the prosecutor's statements, we will reverse only if "a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Abraham, supra* at 5. We find that no such error occurred.

Defendant first claims that the prosecutor's comment on the vicious nature of this robbery, as compared to other robberies, and reference to Maryland as a "little girl" in rebuttal were attempts to elicit the juror's sympathies for Maryland. Defendant correctly states that it is improper for a prosecutor to elicit sympathy for the victim from the jury. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The prosecutor's statements, however, were not prejudicial. Presenting proof of an assault was part of the prosecutor's burden of proving armed robbery. *People v Watkins*, 247 Mich App 14, 33; 634 NW2d 370 (2001). "The offense of assault requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Id.* By commenting on the fact that defendant Brown pointed a gun at Maryland's head while telling her that he was going to "take her out" if she did not cooperate, the prosecution was emphasizing evidence that showed the reasonableness of Maryland's apprehension of being physically harmed. Similarly, the reference to Maryland as a "little girl" was not improper. Maryland was twenty-five years old, but she was approximately eight inches shorter than defendant Brown. This fact also supports the reasonableness of her fear of being physically harmed. The prosecution's argument was properly based on the evidence and the inferences arising from the evidence.[9] *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Even if these comments were improper, we would find that no error requiring reversal occurred. Taken in context, the comments were isolated. See *Watson, supra* at 591. Moreover, the trial court instructed the jury that its decision should not be influenced by sympathy and that the arguments of the attorneys are not evidence. Reversal, therefore, is not required. *Id.* at 591-592; *Abraham, supra* at 5.

Defendant Brown also argues that the prosecution improperly vouched for the truthfulness of the identification testimony provided by Maryland and Gibson. The prosecutor's comments concerning Maryland's testimony emphasized the consistency of her identification of defendant from the time of Officer Rea's arrival on the scene and discredited defense counsel's criticism of her failure to identify a specific distinguishing characteristic of defendant Brown's voice. In rebuttal argument, the prosecutor responded to defense counsel's attempt to impeach

[9] Although at one point, the prosecutor told the jury that it could "sympathize with her in her situation," the situation to which the prosecution was referring was not the crime or any act of the defendants, but the vigorous cross-examination pursued by defendants' attorneys. This statement did not prejudice defendant, particularly in light of the fact that immediately following that comment, the prosecutor stated, "[b]ut again, don't look at the extraneous unimportant things, look at the important things from day one."

Maryland's credibility with her prior statement at the preliminary exam that she "thought" that defendant Brown was the perpetrator. This response to defendant's impeachment does not constitute improper bolstering. See *People v Bahoda*, 448 Mich 261, 279-280; 531 NW2d 659 (1995).

However, the first comment defendant cites concerning the veracity of Gibson's testimony was not appropriate. After making reference to the "sweet heart deal" Gibson entered into with the prosecution in exchange for her testimony, the prosecutor stated:

> As a prosecutor it's our duty to present truthful testimony. And that was part of her plea agreement. She was never asked to nail the wrong person, never asked to tell us anything we want. Her instructions were, were clear, and you heard it from the witness stand. We want truthful testimony, and you have your deal if these guys are convicted or not. And that's a very important thing. There's no justice to get somebody on the stand and ask them to lie. And if a witness is going to take the stand on behalf of the prosecution, we're going to make it clear that that's all we want. We want the truth. And I think that was what her testimony showed. I think there's something inherently reliable about Ms. Gibson's statement.

Although the prosecutor made this comment in an attempt to discount defense counsel's accusations on cross-examination that Gibson would lie to keep from going to prison, the prosecutor improperly relied on her duty as a prosecutor to present truthful testimony to support the veracity of Gibson's testimony. *Bahoda*, *supra* at 227 n 26, citing *People v Quick*, 58 Mich 321, 324; 25 NW 302 (1885), and 281 n 37, citing *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). Nevertheless, we find that this error does not require reversal. Because our review of this unpreserved error is limited to plain error affecting defendant's substantial rights, reversal is not required unless the error caused the jury to convict an actually innocent man or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Abraham, supra* at 5. Because the trial court instructed the jury that the arguments of the attorneys are not evidence and the jury is presumed to follow the trial court's instructions, *Abraham, supra* at 7, we find that the prosecutor's statement did not cause the jury to reach its verdict. Moreover, given the evidence against defendant Brown, we find that he was not actually innocent. We also find that the prosecutor's comment did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

The final comment defendant Brown cites concerning Gibson's testimony focused on her initial failure to identify defendant Brown to the police. The prosecutor commented that rather than lying, Gibson was withholding information concerning her involvement, as well as that of defendant Brown, her boyfriend's friend. This statement was not an attempt to give the jury an indication that the prosecutor had "some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276. Rather, the prosecutor was pointing out that Gibson's initial statements, although not complete, were consistent with the full account she provided by the end of her

police interview. Therefore, plain error did not occur, and reversal is not required.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra